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Supreme Court of the United States

October Term, 1968.

No. 767

DELTA THEATRES, INC.,
Petitioner,

versus

PARAMOUNT PICTURES, INC., ET AL.,
Respondents.

OPPOSITION TO ISSUANCE OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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Paramount Pictures, Inc., Paramount Film Distributing Corporation, Paramount Gulf Theatres, Inc., Metro-Goldwyn-Mayer, Inc., Metro-Goldwyn-Mayer Distributing Corporation of Texas, Radio-Keith-Orpheum, Inc., RKO Radio Pictures, Inc., RKO Theatres, Inc., Warner Bros. Pictures, Inc., Warner Bros. Pictures Distributing Corporation, Twentieth Century-Fox Film Corporation, Twentieth Century-Fox Distributing Corporation, United Artists Corporation, Columbia Pictures Corporation, Columbia Pictures of Louisiana, Inc., Orpheum Theatre & Realty Co., Ltd. and Canal Realty & Improvement Co., Ltd., oppose the issuance of a writ in this case.

STATEMENT.

The complaint was filed on January 8, 1953. After petitioner's appeal to the United States Court of Appeals for the Fifth Circuit (the partial judgment in favor of respondents was affirmed on November 14, 1958, *Delta Theatres, Inc. v. Paramount Pictures, Inc.*, 259 F. 2d 563), the district court ordered a pretrial conference to be held on June 11, 1959. Petitioner moved for a continuance and the conference was continued to be reassigned.

On December 15, 1959, the pretrial was held and there was then entered the order with respect to the filing on April 4, 1960, of a Note of Evidence. Two years later, Hon. J. Skelly Wright, the trial judge who entered the order, was appointed to the Court of Appeals for the District of Columbia, which office he assumed in April, 1962.

Nothing was done in the action until:

On February 8, 1967, the district court issued notice of pretrial conference, which, upon motion of petitioner, was continued.

On March 3, 1967, respondents filed a motion to dismiss under FRCP 41(b). On 2 occasions the hearing on this motion was continued pursuant to petitioner's motions.

On March 31, 1967, the District Court, pursuant to Rule 41(b), dismissed the action.

ARGUMENT.

I.

Rule 19 of the Revised Rules of this Court.

This petition does not present any of the considerations referred to in Rule 19, 1, (b). The decision of the court of appeals is not in conflict with any decision of another court of appeals. The court of appeals has not decided an important question of federal law which has not been settled. See *Link v. Wabash L. Co.*, 370 U.S. 628, 82 S. Ct. 1386, 8 L. Ed. 2d. 734 (1962). It has not departed from the accepted and usual course of judicial proceedings.

It appears from the decision of the circuit court in this action that petitioner petitioned that court for a rehearing en banc and "no member of this panel nor Judge in regular active service on the Court having requested the Court be polled on rehearing en banc," the petition for rehearing was denied. (Petitioner's brief, p. 42.) Thus, in a sense, the decision of the court of appeals was not only by the panel, but received some consideration from all of the judges in active service on that court.

It is submitted that the district judge exercised soundly the discretion vested in him and that the court of appeals properly affirmed such exercise.

II.

Judge Wright's Order of December 15, 1959 was not Voided by his Appointment to Another Court.

It would be a novel doctrine that the translation of a judge to another court from the court in which he entered an order renders such order null.

Petitioner's petition for writs states:

> "Antitrust litigation is notoriously difficult and time consuming. A great number of depositions had been taken in this case; the witnesses are many; the exhibits (by Mr. Burke's estimate before he completed his full list) exceeded 2,500. It is not a case which could have been squeezed easily into some other judge's docket. All counsel believed (reasonably, we submit) that Judge Wright's elevation made his pretrial deadlines no longer effective. How else explain the failure of all counsel to comply with this pre-trial order?" (p. 18.)

Even assuming the existence of such doctrine, there was an interregnum of 2 years between the entry of the order and the judge's appointment to another court; and there was an interregnum of substantially 2 years between April 4, 1960, the critical date fixed in the order, and the Judge's translation to the Court of Appeals for the District of Columbia.

This time lapse of 2 years is alone enough to establish failure to prosecute. *Salmon v. City of Stuart,* 194 F.2d. 1004 (5 Cir. 1952).

III.

Dismissal under FRCP 41(b) was Proper in the District Court and Properly Affirmed in the Circuit.

Both the district and the circuit court took into account all the circumstances that attended the action. (Petitioner's brief, Appendix A, pp. 32/33—Findings of Fact by the district court.)

The court of appeals said (opinion):

> "The district judge here found that the order to file a note of evidence and list of documents was not complied with; that an order for a pretrial conference was continued indefinitely on appellant's motion; that a hearing on the motion to dismiss for failure to prosecute was continued twice on plaintiff's motion; that no action had been taken by plaintiff in this cause since December 23, 1959 and that since transactions were involved in this case dating from 1947, the defendants have been prejudiced by plaintiff's lack of diligence." (p. 40 of Petitioner's Brief.)

Indeed, the court of appeals noted that the district court, in view of the seven-year delay by petitioner, should have dismissed sua sponte:

> "It would be an intolerable situation which would not permit a dismissal with prejudice in circumstances such as those present in this case. Approximately fourteen years after suit was filed, with no action taken for about seven years, plaintiff can not be heard to complain that his case has now

been dismissed with prejudice. It is surprising that such action was not taken by the district court sua sponte, long before defendants filed their motion. Link v. Wabash R. Co., 370 U.S. 626, 82 S. Ct. 1386, 8 L. Ed. 2d. 734 (1962); West v. Gilbert, 361 F. 2d. 314 (2 Cir. 1966), cert. den. 385 U.S. 919, 87 S. Ct. 229, 17 L. Ed. 2d. 143; Shotkin v. Westinghouse Elec. & Mfg. Co., 169 F. 2d. 825 (10 Cir. 1948); American Nat. Bank & Trust Co. v. United States, 142 F. 2d. 571 (D.C. Cir. 1944); and Hicks v. Bekins Moving & Storage Co., 115 F. 2d. 406 (9 Cir. 1940)." (pp. 40/41 of Petitioner's Brief.)

IV.

No Duty Required Respondents to Proceed.

FRCP 41(b) puts the onus on petitioner to prosecute. In this connection we refer to the order of December 15, 1959. It required all parties to file on April 4, 1960, a Note of Evidence. This Note includes not only a listing and numbering of all documents but a summary of the testimony that is expected to be given by the witnesses.

Respondents had, in early March, 1960, identified and marked more than 2500 exhibits (P.R. 164, et seq.). This is set forth in a letter dated March 8, 1960, from counsel for Petitioner to officers thereof.

It is submitted that it is clear from that letter that the only possible subject of agreement was the documents. It would be impossible for counsel for respondents to prepare summaries of testimony expected to be

given by witnesses—as yet unnamed—who would be tendered by petitioner. Even if respondents had agreed to undertake that impossible task, seven years passed after the delivery date without action by petitioner. There is no evidence of any demand upon, or request to, respondents to supply petitioner with a "first draft".

V.

CONCLUSION.

Every contention advanced here was presented to the district court and the court of appeals and was rejected: "with no action taken for about seven years, plaintiff can not be heard to complain that his case has now been dismissed with prejudice."

Respectfully submitted,

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CERTIFICATE.

The undersigned attorney for respondent hereby certifies that copies of the above and foregoing brief in opposition have been served on all attorneys of record.

New Orleans, La., December ...., 1968.

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HARRY McCALL, JR.